

No. ~~100~~ 29

IN THE
Supreme Court of the United States

October Term 1954

THE UNITED STATES, *Petitioner*

v.

KOPPERS COMPANY, INC., Successor on Merger to Koppers
United Company and Subsidiaries

MEMORANDUM OF RESPONDENT IN OPPOSITION

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United Company and Subsidiaries

MEMORANDUM OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 14-29), entered December 1, 1953, is not yet officially reported.

JURISDICTION

The opinion and judgment of the Court of Claims were entered December 1, 1953. (R. 24) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

Whether the taxpayer is required by law to pay interest on theoretical deficiencies in excess profits taxes which never in fact existed when the excess profits credit under Section 722 of the Internal Revenue Code was properly reflected in determining taxpayer's excess profits tax liability.

STATUTES INVOLVED

The applicable portions of the pertinent statutes are set forth in the Appendix, *infra*, p. 6.

STATEMENT

The findings of fact of the Court of Claims are summarized as follows.

The taxpayer is a corporation which filed original and amended excess profits tax returns for the calendar years 1940 and 1941 and paid the taxes shown thereon to be due. (R. 25)

In arriving at the amounts of such taxes, the taxpayer used an excess profits credit¹⁴ computed without regard to Section 722 of the Internal Revenue Code. (R. 23, n. 10; R. 26)

Thereafter on September 15, 1943, the taxpayer filed applications asking for a larger excess profits credit based on a constructive average base period net income in accordance with Section 722 of the Internal Revenue Code. Amended applications were filed on September 10, 1945, and November 20, 1945. A constructive average base period net income under Section 722 was agreed to by the taxpayer and the Bureau of Internal Revenue, which amount was approved by the Excess Profits Tax Council of the Bureau on January 10, 1951 (R. 26)

In February 1951, the Bureau made computations to indicate that but for the use of the excess profits credit based on the constructive average base period net income, as provided by Section 722, the taxpayer would have been subject to additional excess profits taxes of \$460,408.91 for

1940 and \$426,730.95 for 1941, but as a result of the use of the excess profits credit allowed under Section 722, the additional taxes actually due were only \$260,554.39 for 1940 and \$95,749.33 for 1941. (R. 26-27)

On March 8, 1951 the Bureau issued a statutory notice of a determination of deficiencies, which read in part as follows:

“You are advised that the determination of your excess profits tax liability for the years ended December 31, 1940, 1941, * * * discloses deficiencies of \$260,554.39, \$95,749.33, * * * respectively.”

These amounts were assessed as deficiencies on April 17, 1951. (R. 28-29)

In the notice and demand for collection the Bureau included interest on the amounts of \$460,408.91 and \$426,730.95, instead of on the assessed deficiencies of \$260,554.39 and \$95,749.33 which it had finally determined to be due. (The taxpayer paid and does not contest the interest on the actual deficiencies of \$260,554.39 and \$95,749.33.) The excess interest of \$94,358.71 for 1940 and \$178,784.48 for 1941 was paid by the taxpayer and was found to represent an overpayment by the Court of Claims, and a judgment was entered for the taxpayer. (R. 29)

REASONS FOR DENYING THE WRIT

1. The decision of the Court of Claims is correct. Throughout his petition the Solicitor General insists on using the word “deficiencies” in referring to the theoretical amounts upon which the interest in controversy was computed by the Bureau, whereas it is clear that the only “deficiencies” under Section 271, I.R.C., were the amounts finally determined in the statutory notice of deficiency and assessed and collected as such. These real statutory deficiencies were the only amounts upon which the taxpayer was required by Section 292, I.R.C., to pay interest. These

amounts and interest thereon were paid by the taxpayer and are not in dispute.

Under Section 722 (a), if the tax "computed" without the benefit of the Section would be "excessive and discriminatory", then the tax is to be "determined" by using the constructive average base period net income "in lieu of" the actual average base period net income. What the government now seeks is interest on a tax "computed" but not "determined" and characterized by the statute itself as "excessive and discriminatory".

The Court of Claims considered this question first in *Henry River Mills Co. v. United States*, 1951, 96 F. Supp. 477, and decided in favor of the taxpayer. Thereafter, two District Courts also decided the question in favor of the taxpayer, *Premier Oil Refining Co. of Texas v. United States*, D.C., N.D., Texas, 1952, 107 F. Supp. 837, and *Kuder Citrus Pulp Co. v. United States*, D.C., S.D., Fla., 1953, 117 F. Supp. 395. When the government refused to follow these decisions, the Court of Claims again considered the problem in this case and speaking through Judge Littleton again decided in favor of the taxpayer. Thereafter, a third District Court came to the same conclusion in *Surface Combustion Corp. v. United States*, D.C., Ohio, 1953 P-H, par. 72,804. The only court which is in conflict with the Court of Claims is the Court of Appeals for the Fifth Circuit in *United States v. Premier Oil Refining Co. of Texas*, 1954, 209 F. 2d 692. Three District Courts and the Court of Claims on two different occasions having answered the question in favor of the taxpayer, there is no occasion for this Court to act.

2. Since the principle involved here is not like that in the carry-back cases such as *Manning v. Seeley Tube and Box Company*, 338 U.S. 561, and *Rodgers v. United States*, Ct. Cl., 108 F. Supp. 727, there is no conflict—in principle or otherwise—with those cases. In the carry-back cases, the deficiencies in the taxable years were eliminated by events which took place in subsequent years, while here all

the facts affecting the tax liability for 1940 and 1941 were actually in existence during the taxable years. Every court which has considered the question, except the Fifth Circuit, has distinguished the instant situation from that involved in the carry-back cases.

3. The question is one arising under a tax law which was repealed eight years ago, and it involves no question of national importance. The fact that there are still a large number of claims for relief under Section 722 for 1945 and prior years pending before the Internal Revenue Service and in the courts should not be a reason for this Court to grant a writ in this case, particularly where every court except one has agreed with the taxpayer. No suggestion is made by the Solicitor General that the granting of the writ will expedite the disposition of these claims by the Commissioner of Internal Revenue.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1954.

APPENDIX

Pertinent Sections of the Internal Revenue Code:

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

SEC. 722. GENERAL RELIEF—CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.

(a) GENERAL RULE.—In any case in which the taxpayer establishes that the tax *computed* under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be *determined* by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. * * * (Emphasis supplied.)